

given for this dramatic shift in direction, however, are not well founded. The facts that led to the adoption of the rule still exist today. Moreover, the proposed amendment would lessen consumer choice, impair technological innovation, harm independent manufacturers and retailers of CPE, and conflict with Congress' intent to promote a competitive CPE market. For these reasons, the Coalition opposes the Commission's proposed amendment of § 64.702(e).

**B. The Facts that Led to the Adoption of the
Antibundling Rule Still Exist Today**

The Commission's proposal to eliminate the antibundling rule with respect to nondominant interexchange carriers rests primarily on the following rationale: since the 1980 adoption of the rule, the CPE market has become "fully competitive," and AT&T "no longer possesses market power in the overall interstate, domestic, interexchange market"; therefore, the Commission tentatively concludes, "it is unlikely that non-dominant interexchange carriers can engage in the type of anticompetitive conduct that led the Commission to prohibit the bundling of CPE with the provision, inter alia, of interstate, interexchange services." NPRM ¶ 88.

Such potential for anticompetitive conduct, however, was not the Commission's primary reason for adopting the antibundling rule. Thus, while one can debate the Commission's finding that the CPE market is "fully

competitive," even assuming this is true, there is still necessity for retaining the antibundling rule today.

In adopting the rule in 1980 the Commission explained that the rule would promote the Commission's objective of "assuring a viable and competitive market for terminal equipment." 77 FCC 2d at 453. Only two years ago, the Commission reaffirmed that "[t]he underlying rationale for the Commission's procompetitive CPE policies and rules remains as valid today as it was during the Computer II Decisions." NYNEX Enterprise, 9 FCC Rcd 1608 (1994). The Commission explained:

The resulting increased competition among manufacturers has driven improvements in equipment quality, lowered CPE prices, and improved the performance of users' data communications networks. These policies have also created new job opportunities in several related sectors of the economy.^{3/}

Just last year, the FCC restated the benefits described in the NYNEX order as "indicia of the success of [the Commission's] antibundling policy." Verilink, 10 FCC Rcd 8914, 8921 (CCB 1995). That decision also reaffirmed "the Commission's longstanding commitment to the policy of

^{3/} Id. Also in 1994, Congressman Edward Markey observed in a hearing before the House Committee on Telecommunications and Finance that "[u]nbundling [customer premises] equipment . . . [has] allowed for a flowering of manufacturing of telephone equipment for the home and the business. It separated product from service and fostered consumer choice and competition." Oversight Hearings on Interactive Video Systems: Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce, 103d Cong., 2d Sess (Feb. 1, 1994) (Statement of Representative Edward Markey).

unbundling and to the benefits produced by that policy," and declared that "any proponent seeking to modify this policy bears a heavy burden to justify the necessity for such modification." Id.

Another benefit the Commission sought in adopting its antibundling policy was increased consumer choice in telecommunications goods and services. In 1980 the Commission found bundling equipment and services a "highly questionable" practice because of its effect of restricting consumer choice:

In general, bundling of goods and services may restrict the freedom of choice of consumers and restrains their ability to engage in product substitution. Unless the goods and services in the bundle exactly match the preferences of consumers, consumer satisfaction may be reduced by bundling. Thus, consumer satisfaction could be increased by changes in the marketing structure that allow the users, rather than the vendors, to determine the bundle of goods and services that get purchased.

Computer II Order, 77 FCC 2d at 442. The Commission explained that when the variety of CPE available was limited, it was not difficult for a carrier to satisfy consumers by bundling service with equipment "that included every combination." By 1980, however, the Commission had found that:

with the range of diverse CPE options that are available from other sources, the continued provision of bundled offerings by the service vendors presents distinct potential for limiting the freedom of customers to be able to put together the service and equipment packages most desired by them.

77 FCC 2d at 443.

In 1980 no one could even have imagined the vast array of CPE options that would be available in 1996. Today it would be impossible for a carrier to put together a bundle of services and equipment that would satisfy every customer. To allow carriers to pick and choose from among this array which CPE to bundle (on discounted or "free" terms) with transmission services would inevitably result in consumers being forced to choose among packages, none of which represents their ideal. If the potential for limiting the freedom of customers to assemble their ideal package was sufficient in 1980 to persuade the Commission to adopt the antibundling rule, today that potential certainly justifies retaining the rule.

Ten years after adoption of the rule, the Commission explained, "By requiring common carriers to offer unbundled CPE and transmission services, the Commission gave customers the ability to design their own CPE and service packages to best meet their individual communications needs."

Competition in the Interstate Interexchange Market Place
(Notice of Proposed Rulemaking), 5 FCC Rcd 2627, 2648 (1990).
The Commission does not now explain why customers should no longer be afforded this opportunity.

Restricting consumer choice not only decreases customer satisfaction, it also leads inevitably to a decrease in technological innovation. Bundling encourages the development of equipment designed specifically for use with

one provider's service to the exclusion of other providers' services. While such equipment may utilize advanced technology, it lacks the functionality of equipment developed in a competitive marketplace and may restrict a consumer's options to take service from a variety of providers. With such equipment offered as part of the "bundle," consumers have little incentive to purchase multifunctional equipment offered by independent manufacturers and retailers.

Such was the state of the CPE market prior to the Commission's adoption of the antibundling rule in 1980. Only after the Commission established its antibundling policy did manufacturers have the confidence (and the opportunity) to invest substantial R&D capital in the development of CPE that would be compatible with the multitude of services offered over the telecommunications network. If the antibundling rule were repealed, the incentive for investment in such equipment would decrease.

It is no accident that American consumers and businesses have had access to the widest variety of affordable CPE in the world over the last decade; it is a direct result of the antibundling rule. With the antibundling rule in place, consumers have benefitted greatly by having the opportunity to select and purchase CPE separate from service in a competitive market, free of equipment subsidies.

The antibundling rule has spawned the dramatic growth in the variety of telephones (including cordless and

speakerphones), answering devices, fax machines, as well as personal computers with modems. Business and retail customers may now purchase CPE in thousands of locations throughout the nation, making their own choices among features, price, and service after the sale -- consonant with their particular requirements -- and confident that the equipment is compatible with the telephone network. The Commission should not chart a course which will result in serious impediments to the type of CPE competition that has resulted from vigorous enforcement of the antibundling rule.

C. Carriers Today Can Offer Service/Equipment Packages Consistent with the Antibundling Rule

The Commission also bases its proposed amendment of the antibundling rule on the principle that "allowing non-dominant interexchange carriers to bundle CPE with interstate, interexchange services would promote competition by allowing such carriers to create attractive service/equipment packages for customers." NPRM ¶ 88. The antibundling rule, however, does not preclude carriers from creating service/equipment packages. It merely requires them to separately charge for each component and not to subsidize the provision of equipment from the charges for service.

Thus, interexchange carriers today can offer "one-stop-shopping" to their customers, offering packages of services and equipment, as long as the charges for each are separately stated and the equipment is not subsidized from charges for service. In this way, carriers now may determine the types

of service/equipment packages that they believe would be appealing to many customers, and interested customers could buy both the equipment and the service from the carrier in one package. However, the customers would be able to see exactly what they are paying for the equipment. This "unbundling" requirement allows customers to choose between purchasing the entire package from the carrier or purchasing only the service from the carrier while purchasing more competitively-priced equipment or equipment with different features elsewhere.

Since carriers can now offer such packages to customers consistent with the antibundling rule, the only incentive for elimination of the rule is the opportunity to offer "discounted" or "free" equipment, which, in reality, is subsidized by higher service rates to the detriment of all consumers.

D. The Commission's Proposal Conflicts with Recent Congressional Directives

The anticompetitive implications of bundling equipment and telecommunications service have been addressed by Congress twice recently. In the Cable Television and Consumer Protection and Competition Act of 1992,^{4/} Congress directed the Commission to promulgate regulations to mitigate the harmful effects equipment bundling has on consumers of

^{4/} Pub. L. No. 102-385, 106 Stat. 1491.

cable television service. For example, Section 17 of the Act directs the Commission:

(C) to promote the commercial availability, from cable operators and vendors that are not affiliated with cable systems, of converter boxes and of remote control devices compatible with converter boxes;

(D) to require a cable operator who offers subscribers the option of renting a remote control unit --

(i) to notify subscribers that they may purchase a commercially available remote control device from any source that sells such devices rather than renting it from a cable operator; and

(ii) to specify the types of remote control units that are compatible with the converter box supplied by the cable operator.

47 U.S.C. §§ 544a(c)(2)(C) & (D). In implementing these and other provisions of the 1992 Cable Act, the Commission has ordered the unbundling of cable equipment and installation rates from service rates.^{3/}

In the Telecommunications Act of 1996,^{4/} Congress found it necessary to enact nearly identical antibundling provisions with respect to the multichannel video programming industry. Newly enacted Section 629(a) of the Communications Act (to be codified at 47 U.S.C. § 549) directs the Commission to adopt regulations to assure the commercial availability to consumers of equipment used to access all services offered over multichannel video programming systems from manufacturers, retailers and other vendors not

^{3/} Cable Rate Regulation, 72 R.R.2d 733, 808-15 (1993).

^{4/} Pub. L. No. 104-104, 110 Stat. 56 (1996).

affiliated with any multichannel video programming distributor ("MVPD").⁷ While the law also allows an MVPD to provide such equipment, it requires that if the MVPD does so, the system operator's charges to consumers for the equipment must be separately stated, and that the equipment must not be subsidized by service charges.

It is ironic that the Commission proposes to repeal its antibundling rule with respect to nondominant interexchange carriers in the face of Congress' concern over the negative effects that bundling of goods and services has on the equipment marketplace, especially for those manufacturers and vendors not associated with the service providers.

E. The Proposed "Amendment" Would Inevitably Result In Wholesale Repeal of the Antibundling Rule

Although the Commission proposes to "amend" § 64.702(e) by allowing nondominant interexchange carriers to bundle CPE with service, the proposal would in fact eliminate the rule with respect to interexchange service since the Commission has found that there are presently no dominant interexchange carriers. Moreover, when the BOCs begin offering interexchange service, it is unlikely that the Commission will hold them to the antibundling rule if every other interexchange carrier is permitted to bundle.

⁷ MVPDs include "a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(12).

Under the new regulatory scheme, carriers may provide both local and interexchange service and undoubtedly will offer local and interexchange service in one package. As these services become bundled, it will be impractical for the Commission to allow carriers to bundle CPE with interexchange service, but prohibit bundling CPE with local exchange service. Inevitably, then, the Commission will "amend" the rule again to allow carriers to bundle CPE with local exchange service. Thus, the Commission's current proposal to amend § 64.702(e) will eventually result in wholesale repeal of the antibundling rule. For this reason alone, the Commission should not take the step it is proposing today.

II. IF THE COMMISSION AMENDS § 64.702(e) IT ALSO MUST REQUIRE INTEREXCHANGE CARRIERS TO CONTINUE TO OFFER SEPARATELY, UNBUNDLED SERVICES ON A NONDISCRIMINATORY BASIS

As shown above, the Coalition emphatically opposes the Commission's proposal to amend § 64.702(e). However, if the Commission amends the rule to allow nondominant interexchange carriers to bundle service and equipment, it also must require carriers offering bundled packages to continue to offer separately, unbundled, unsubsidized interstate, interexchange services on a nondiscriminatory basis. See NPRM ¶ 89.

When service and equipment are bundled, consumers are unable to ascertain the cost of the bundle's constituent elements. Without this price information, consumers cannot "cross-shop" effectively for the combination of service and

equipment that best fits their needs at the price they are willing to pay. Consumers who obtain equipment from a source other than the provider of the bundled offering, are, in effect, subsidizing those who purchase bundled service and equipment. For these reasons, should the Commission adopt its proposal to amend § 64.702(e), it must require any interexchange carrier that offers bundled packages of CPE and interexchange service:

- to separately state the charges for such CPE and service in marketing materials and bills provided to consumers; and
- to permit such service to be obtained separately at a charge which, when added to the charge for the CPE, does not exceed the amount charged for obtaining such CPE and service jointly.

Another concern must be that those who offer bundled service and CPE to the public will refuse to provide independent or unaffiliated equipment manufacturers the technical information required to manufacture equipment compatible with the service. By denying this information to unaffiliated manufacturers, those providers could preclude competition in the market for equipment competitive with that provided in the bundle.

The Commission, therefore, should require interexchange carriers that bundle CPE and service to make available to unaffiliated equipment manufacturers on a nondiscriminatory and timely basis full and complete information with respect to the protocols, technical requirements, and other

characteristics of all equipment offered to consumers by such provider as a part of, or as an adjunct to, the provider's interexchange service to the extent such information is integral to the interconnection and interoperability of such equipment with such service.

CONCLUSION

For the reasons stated above, the Commission should not amend § 64.702(e) of its rules to allow nondominant interexchange carriers to bundle CPE with interexchange service.

Respectfully submitted,



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April 25, 1996

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CERTIFICATE OF SERVICE

I, Marjorie Schroeder, hereby certify that on this 25th day of April 1996, I caused a copy of the attached Comments of Consumer Electronics Retailers Coalition to be served by hand delivery to the following:

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Marjorie Schroeder

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY 24 1996

In the Matter of)
)
Policy and Rules Concerning the)
Interstate, Interexchange Marketplace) CC Docket No. 96-61
)
Implementation of Section 254(g) of the)
Communications Act of 1934, as amended)

To: The Commission

REPLY COMMENTS OF CONSUMER ELECTRONICS RETAILERS COALITION

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SUMMARY

From the American consumers' perspective, the antibundling rule has been an unqualified success, and one of the Commission's most successful policy initiatives. It has permitted CPE users to obtain innovative, state-of-the-art equipment from a large number of suppliers at reasonable, market-driven prices. This fact alone speaks for retention, not elimination, of the rule.

Supporters of the proposal to amend the rule offer only one alleged benefit: allowing carriers to offer packages of CPE and service to customers. Carriers, however, can already offer such "one-stop-shopping" under the current rule. Thus, "packaging" CPE and service is not the issue; rather, the issue is whether carriers should be permitted to require customers to purchase a package, and whether carriers should be permitted to offer "discounts" on CPE by subsidizing the cost of the CPE with revenues from service.

Even the majority of the supporters of the amendment acknowledge the potential for abuse created by allowing such activity. They therefore offer suggestions for attempting to prevent such abuse. Rather than eliminating a successful rule and then trying to prevent the potential for abuse caused by such elimination, the Commission should simply retain the rule in its present form.

The reasons against amending the rule are compelling:

- it would decrease consumer choice by forcing consumers to choose among carrier-determined

service/CPE packages rather than being able to purchase the combination of CPE and service that bests meets their needs at a price they are willing to pay;

- it would allow the development of proprietary CPE making it difficult for customers to switch carriers;
- it would diminish the vitality of the CPE marketplace; and
- it is fundamentally at odds with the Telecommunications Act of 1996.

If the Commission does amend the rule to allow bundling, Section 202(a) of the Communications Act mandates that the Commission require carriers also to offer separately, unbundled services on a nondiscriminatory basis. Carriers cannot be permitted to discriminate against those customers who elect not to use the carrier-provided CPE. Carriers also must be required to disclose all interface specifications using existing industry guidelines and procedures.

The record in this proceeding does not justify amendment of the rule. Given that fact and the radical regulatory changes occurring in the telecommunications industry today, the Commission should defer consideration of any amendment of the antibundling rule at this time.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Policy and Rules Concerning the)
Interstate, Interexchange Marketplace) CC Docket No. 96-61
)
Implementation of Section 254(g) of the)
Communications Act of 1934, as amended)

To: The Commission

REPLY COMMENTS

The Consumer Electronics Retailers Coalition (the "Coalition"),^{1/} hereby files Reply Comments on the Commission's Notice of Proposed Rulemaking (NPRM) in the captioned proceeding.^{2/}

I. THE COMMISSION SHOULD NOT AMEND § 64.702(e) TO ALLOW NONDOMINANT INTEREXCHANGE CARRIERS TO BUNDLE CPE WITH INTERSTATE, INTEREXCHANGE SERVICES

A. Introduction

In its Comments, the Coalition explained why Section 64.702(e) of its Rules -- the "antibundling rule" -- should not be amended to allow nondominant interexchange carriers to bundle CPE with interstate, interexchange services. Comments

^{1/} The members of the Coalition are major retailers of consumer electronics products in the United States, and their trade associations. They include Best Buy, Circuit City, Dayton Hudson, Montgomery Ward, Sears, Tandy, the International Mass Retail Association, the North American Retail Dealers Association, and the National Retail Federation.

^{2/} NPRM released March 25, 1996, FCC 96-123.

filed by other parties underscore why the rule should not be amended.

The comments demonstrate that from the consumer's perspective, the antibundling rule has been an unqualified success, and one of the Commission's most successful policy initiatives.^{3/} ITAA, for example, explains that the rule has allowed its member companies to obtain "innovative, state-of-the-art equipment from a large number of suppliers at reasonable, market-driven prices."^{4/}

Some proponents of bundling argue that the antibundling rule should be repealed precisely because of its success in encouraging a competitive CPE marketplace.^{5/} The fact that the rule has helped to create the competitive CPE marketplace that the Commission intended, however, is a reason to retain the rule, not to repeal it.^{6/} As shown in the Coalition's Comments and herein, repeal of the rule would lead to a reduction in CPE competition, turning back the clock to the period when a few suppliers provided CPE to carriers and there was little consumer choice as to CPE features, functions or price.

^{3/} Comments of the Information Technology Association of America ("ITAA") at 3; Comments of Independent Data Communications Manufacturers Association ("IDCMA") at 2; Comments of MCI Telecommunications Corporation at 22.

^{4/} ITAA at 2.

^{5/} See, e.g., Comments of Excel Telecommunications, Inc. at 5.

^{6/} See ITAA at 3; IDCMA at 12.

Supporters of the Commission's proposal offer only one alleged benefit from repeal of the rule: it would allow carriers to offer packages of CPE and service to customers. As the Coalition and others showed, however, such "one-stop shopping" is already both permitted and existing under the current rule. Therefore, no amendment of the rule is necessary to achieve this benefit.

Even supporters of the proposed amendment recognize the dangers inherent in permitting bundling, and offer suggestions for attempting to prevent the occurrence of abuse should bundling be permitted. Rather than eliminate a highly successful rule and trying to prevent abuse resulting from such elimination, the Commission should simply retain the rule in its present form.

B. The Commission's Focus On The Potential For Antitrust Violations Is Misplaced

The justification proffered by the Commission for amendment of the rule is that the potential for anticompetitive activity or "tying" is not as great now as it was at the time of adoption of the rule.¹⁷ The Commission's focus on the precise legal definition of "tying" and whether the rule is necessary to prevent antitrust violations is misplaced. As the Coalition and others demonstrated, that was not the sole reason, or even the primary reason, for the

¹⁷ NPRM 99 87-88.

adoption of the rule, and it is not reason enough for its repeal.^{8/}

The Coalition agrees with ACTA that the Commission's analysis cannot end with whether there is a potential for unlawful tying.^{9/} Rather, regardless of whether certain behavior passes muster under the antitrust laws, the Commission must also determine whether it is in the public interest.^{10/} As shown in the Coalition's Comments and herein, bundling reduces consumer choice and is contrary to the public interest.

C. Carriers Today Can Offer "One-Stop Shopping" Consistent With The Antibundling Rule

Supporters of the Commission's proposal argue that repeal of the antibundling rule is necessary because carriers must have the ability to offer packages of CPE and service in order to provide consumers with what they want. For instance, API contends that bundling is necessary because

^{8/} See Comments of the Coalition at 3-6; IDCMA at 3-4.

^{9/} Comments of America's Carriers Telecommunications Association ("ACTA") at 17.

^{10/} Even if an antitrust analysis were sufficient grounds for repeal of the rule, the Commission has not engaged in such an analysis. It simply proclaims that the risk of anticompetitive activity has been reduced because "nondominant" firms lack market power. This is not enough. Rather, "the Commission must conduct a fact-specific assessment of the realities of the marketplace" since "[f]irms lacking market power have nonetheless been found to have the ability to engage in tying." IDCMA at 34. If the Commission is going to justify its action on antitrust grounds, then it must perform a true antitrust analysis, which it has not done.

"constraints on a carrier's ability to offer both equipment and service impedes the ability to obtain an integrated telecommunications package."^{11/} GTE supports the proposal because it allows "one-stop shopping."^{12/} Sprint believes that repeal of the rule is warranted because "many consumers seek to reduce their transaction costs by requesting that Sprint provide both the communications services and equipment in a bundled package."^{13/}

But, as shown by the Coalition and others, such "packaging" is permitted under the rule as it stands today. US WEST explains that the rule does not interfere with the ability of any carrier, dominant or nondominant, to market packages of services including CPE and basic transmission service.^{14/} Carriers can (and do) offer one-stop shopping under the present rule, so long as the charges for each are separately stated and the equipment is not subsidized from charges for service.^{15/} Thus, the argument that repeal of the rule is necessary to "reduce transaction costs" is simply wrong. As ITAA explains, the antibundling rule disadvantages

^{11/} Comments of the American Petroleum Institute ("API") at 15.

^{12/} Comments of GTE Service Corporation at 10.

^{13/} Comments of Sprint Corporation at 28. See also Comments of the Telecommunications Resellers Association ("TRA") at 40-41; Comments of SBC Communications Inc. at 7.

^{14/} US WEST, Inc. Comments at 7.

^{15/} Coalition at 8-9. See also IDCMA at 12.

no one since it does not deny consumers the benefits of one-stop shopping, nor does it preclude a carrier from providing CPE.¹⁶

The only incentive for elimination of the rule is the opportunity to offer "discounted" or "free" CPE, which, in reality, is subsidized by higher service rates. This desire to subsidize CPE is implied, though never expressly stated, by those who support modification of the rule. For example, Excel argues that only by eliminating the rule would carriers be able to offer "attractive" service/equipment packages to customers.¹⁷ AT&T similarly argues that the antibundling rule "foreclose[es] the ability of providers to create and offer packages of services and CPE, which can provide consumers with value, efficiencies and pricing solutions that they demand."¹⁸

While such subsidized bundles may appear attractive to customers on the surface, the costs of bundling ultimately are passed through to consumers in the form of higher service charges. Bundling does not lower the total cost to consumers, since a carrier that provides a discount on CPE to purchasers of a package must still recover the cost of both components of the package. If costs are not recovered on CPE, then they must be recovered through higher service

¹⁶ ITAA at 4.

¹⁷ Excel at 5.

¹⁸ Comments of AT&T Corp. at 26.

charges.^{19/} Further economic inefficiencies are inevitable because consumers would not know the cost or price of the constituent elements that they are buying as a package.

Bell Atlantic argues that allowing bundling in the cellular marketplace has resulted in growth in the cellular industry and increased competition among cellular providers.^{20/} However, bundling in the cellular market grew out of very different conditions that are not present in the interexchange market. Indeed, the FCC based its decision to permit cellular bundling "on the unique conditions in the cellular market today"^{21/} Those conditions were described as a highly competitive cellular CPE marketplace featuring numerous manufacturers, retailers and other vendors and a desire to promote cellular subscribership and efficient spectrum utilization. By contrast, there is no public policy justification today for promoting interexchange usage, no issue of spectrum utilization and nothing approaching a vigorously competitive market for services and equipment yet to be devised.

Moreover, most cellular CPE is sold by independent retailers who also act as agents for the cellular carriers in their market; these retailers commonly offer equipment

^{19/} See IDCMA 38-39.

^{20/} Comments of Bell Atlantic at 6.

^{21/} Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd 4028 (1992).